Supreme Court, U.S.
FILED
05-868 NOV - 9 2006
OFFICE OF THE CLERK

No.

In The

United States Supreme Court

Maurice Wayne Jones and Dorenda Price Jones,
Petitioners,

v.

Fred Bass,
Respondent,

v.

Ron Thomas,
Respondent,

v.

Gerald Goulding,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Appearing without agent or representation
Maurice and Dorenda Jones
PO Box 117
Grover, Wyoming 83122
(307)886-3356

QUESTIONS PRESENTED

A "Notice of Levy" is served by an Internal Revenue Service agent on an entity, such as a Bank, with the purpose of seizing funds from a Bank client. The Notice of Levy cites as its authority 26 USC § 6331 LEVY AND DISTRAINT paragraphs (b) and (c) but the Notice does not cite paragraph (a) which contains the critical scope and definition.

> "*Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer .... of such officer, employee, or elected official.*"

The following questions are presented;

1. "Does USC 26 Section 6331 authorize a levy or notice of levy on the rewards of labor of a natural human being in the private sector who is living and working in one of the 50 states and who is not an "officer, employee, or elected official, of the United States" as described in the deliberately omitted paragraph (a)?"

2. Does the specific mention in 26 USC § 6331(a) of upon what "levy may be made" and upon whom "notice of levy" may be served create the legal presumption that levy or notice of levy may not be made on something or someone who does not fit that expressed description? (*expressio unius est exclusio alterius*)

3. Does an Internal Revenue Service Agent commit fraud by concealing a material fact when serving a "Notice of Levy" which omits paragraph (a), the scope and authority of levy?

PARTIES TO THE PROCEEDINGS

The Petitioners/Plaintiffs include Maurice Wayne Jones and Dorenda Price Jones.

The Respondents/Defendants include alleged IRS agent FRED BASS, Bank President Ron Thomas, and Bank attorney Gerald Goulding.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners respectfully state as follows:

Maurice Wayne Jones and Dorenda Price Jones are natural human beings and American Citizens, living in Wyoming, having Constitutional Rights and are not corporations or any other type of trade or business entity.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

WRIT OF CERTIORARI 1

OPINIONS AND ORDERS IN APPENDIX 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 3

CONCLUSION 6

APPENDIX A, ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AFFIRMING THE JUDGMENT OF THE DISTRICT COURT *1a*

APPENDIX B – JUDGMENT OF THE U. S. DISTRICT COURT FOR THE DISTRICT OF WYOMING 4*a*

APPENDIX C – ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT OF THE U. S. DISTRICT COURT FOR THE DISTRICT OF WYOMING *5a*

TABLE OF AUTHORITIES

26 USC § 6331 . . . . . *i*
26 USC § 6331(a) . . . . . *i*
26 USC § 6331 1
26 USC § 6331 2
Black's Law Dictionary, Sixth Edition, Page 670 2
United States Constitution Amendment 5 2
26 USC § 6331(a) 3
26 USC § 6331 4
Sims v. United States, 359 US 180 (1959) 4
Federal Crop Ins. v. Merrill, 33 U.S. 380 at 384 (1947) . . 5
People v. Godfrey, 17 Johnson 225, NY 5
Brooks v. Yawkey 200 F. 2d. 633 5
26 USC § 6331 6

WRIT OF CERTIORARI

Petitioners Maurice Wayne Jones and Dorenda Price Jones respectfully petition this Court for a writ of certiorari for the purpose of establishing a nationally uniform understanding of the scope of 26 USC § 6331 and to review the judgment of the United States Court of Appeals for the Tenth Circuit. It is in the public interest that the questions be decided.

OPINIONS AND ORDERS in APPENDIX

The Tenth Circuit Court of Appeals issued its ORDER AND JUDGMENT on Sept 2, 2005, No. 04-8113 (D.C. No. 04-CV-153-WFD) (D. Wyo.). Petitioners subsequently filed a Petition for Rehearing, which was denied by the Court on September 28, 2005.

The United States District Court for the District of Wyoming issued its JUDGMENT IN A CIVIL CASE on September 30, 2004, Case No. 04-CV-153-D.

The original COMPLAINT was filed in the District Court of the Third Judicial District in and for Lincoln County, Kemmerer, Wyoming on March 30, 2004 Case No. 11456, which was subsequently removed by the United States District Court, Casper, Wyoming.

JURISDICTION

As the Court of Last Resort, this United States Supreme Court has jurisdiction and authority to correct abuses of due process perpetrated by an alleged IRS agent with the complicity of Wyoming federal District Court and the Tenth Circuit Court of Appeals. The critical issue in this case, the validity of the seizure document "Notice of Levy", which quoted federal statute 26 USC § 6331 for its authority, was not addressed by either Court. In fact, the District Court, in a

15 page Order, went out of their way to avoid commenting on 26 USC Section 6331. This injustice must be remedied. Petitioners have maintained from inception that the proper jurisdiction is the District Court of the Third Judicial District, Kemmerer, Wyoming, based on the waiver of sovereign immunity by the alleged agent when he violated statutes, rules, and regulations by serving a Notice on entities not within the scope of that Notice, thus committing fraud and depriving Petitioners of property without due process of law.

CONSTITUTIONAL and STATUTORY PROVISIONS AT ISSUE

United States Code Title 26 Section 6331 is entitled DISTRAINT AND LEVY. The Internal Revenue Service and its alleged agents routinely send a "Notice of Levy" to business entities, such as financial institutions, and quote paragraphs (b) and (c) of Section 6331 on their Notice, knowingly and deliberately omitting paragraph (a). Paragraph (a) describes the scope of levy and the scope of notice of levy. This glaring omission appears to fit the classic definition of Fraud; *"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."* (Black's Law Dictionary, Sixth Edition, Page 670)

United States Constitution Amendment 5 (Article V of the Bill of Rights); The deliberate omission of said paragraph (a) of 26 USC §6331 results in depriving clients of financial institutions, such as Petitioners, of their property without due process of law and entraps financial institutions into being accomplices in the fraud.

STATEMENT OF THE CASE

On March 17, 2004, the First National Bank of Afton, Wyoming received a document titled "Notice of Levy" from alleged IRS agent Fred Bass, instructing said bank to seize funds from the account of Maurice Jones to satisfy an alleged tax bill. The "Notice of Levy" served on the Bank quoted 26 USC § 6331 paragraphs (b) and (c) as authority to levy. Paragraph (a) of said statute was not contained in said Notice. Mr. Jones, Petitioner, showed Bank President Thomas and Bank Attorney Goulding the Internal Revenue Code book and they read the missing paragraph (a) which defines the scope and jurisdiction and authority to levy. The missing paragraph (a) reads,

> "*Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer .... of such officer, employee, or elected official.*"

This cast serious doubt upon the applicability of the statute and seizure instrument to either Petitioners or to Bank Defendants. Petitioner Jones averred to the Bank President and Bank Attorney that he was not in any way described in the jurisdictional statement of said statute, nor was the Bank the "employer" upon whom notice of levy may be served. Petitioner Jones requested the Bank send a letter of inquiry to alleged IRS agent Bass asking for clarification before sending Petitioner's funds to the IRS. Bank officials declined to so do, thus this lawsuit.

The scope and application of the instrument, "Notice of Levy", used to effect the seizure of Petitioner's funds has not been addressed at all in this case by either the US District Court or the Appellate Court, even though that was a focal

point of the suit. Petitioners claimed that if the statute does not pertain to them, then the alleged agent was outside of the bounds of his authority and thus has no jurisdiction over Petitioners and therefore federal courts do not have jurisdiction over this case.

Justice and due process have been denied with the jurisdiction issue as well as other issues. For the sake of brevity and in presenting an issue which is in the public interest and has far-reaching applications, Petitioners ask only for clarification regarding on what or to whom 26 USC § 6331 applies. It is well established by the plain language in 26 USC §6331(a) that it applies to employees, officers, and elected officials of the federal government. In a search, Petitioners found no court rulings relating to 26 USC § 6331 regarding natural human beings in the private sector. The only related case we can find is Sims v. United States, 359 US 180 (1959) wherein the Court said, *"Sections 6331 and 6332 authorize a levy on the accrued salaries of the employees of a State to collect federal income taxes."*

The question in this Petition instance is; "Does USC 26 Section 6331 authorize a levy on the bank deposit of a natural being in the private sector living and working in one of the 50 states who is not an "officer, employee, or elected official, of the United States" as described in the deliberately omitted paragraph (a)?" Petitioner declared to alleged IRS agent Bass prior to seizure, to the Bank at the time of seizure, and to the Courts following seizure that Petitioner funds in that bank were not "*accrued salary or wages*" of a federal employee as described in the statute but instead were the fruits of Petitioners' labor, which property is not subject to the levy as described in the Title 26 statute quoted. The alleged "tax bill" had been previously Contested by Petitioners and the IRS failed to rebut and prove up their claim and therefore Defaulted. If said statute does not apply to Petitioners or to Bank Respondents then fraud has been

committed and this case must be remanded to Wyoming state court for trial.

Petitioners use the term "alleged agent" because Petitioners have repeatedly, for three years, requested/demanded credentials of alleged agent FRED BASS or any documents proving that BASS has delegation of authority and jurisdiction, or indeed that he even exists as per Federal Crop Insurance v. Merrill, 33 U.S. 380 at 384 (1947)

> "*Anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of this authority.*"

Alleged agent BASS and the IRS refused and still refuse to produce any credentials. The Courts have ignored Petitioners' requests/demands to see BASS' credentials. This appears to be further evidence of fraud in this case.

Petitioners filed suit in Wyoming State District Court after having exhausted all administrative remedies. Petitioners believe the case was unlawfully removed from Wyoming jurisdiction by federal District Court as per

> People v. Godfrey, 17 Johnson 225, NY *"that to bring the offense within the jurisdiction of the courts of the union, it must have been committed out of the jurisdiction of any state."*

And

> Brooks v. Yawkey 200 F. 2d. 633 *"...Federal jurisdiction cannot be assumed, but must be clearly shown."*

CONCLUSION

The opinion of the Supreme Court in this case would establish a nationally uniform understanding of the scope and application of 26 USC § 6331 and is in the public interest.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted January 10, 2005

Maurice Wayne Jones and Dorenda Price Jones, Petitioners
Appearing *in propria persona*
PO Box 117
Grover, Wyoming 83122
(307)886-3356
email; jonesy@svwy.net

APPENDIX A – ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AFFIRMING THE JUDGMENT OF THE DISTRICT COURT FILED SEPTEMBER 2, 2005

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04-8113
(D.C. No. 04-CV-153-WFD)
(D. Wyo.)

Maurice Wayne Jones and Dorenda Price Jones,
Plaintiffs-Appellants,
v.
FRED BASS; RON THOMAS; and GERALD GOULDING,
Defendants-Apellees.

ORDER AND JUDGMENT*
Before SEYMOUR, KELLY, and MURPHY Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1 (G). The case is therefore ordered submitted without oral argument.

---

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Plaintiffs Maurice and Dorenda Jones, appearing pro se, filed an action in Wyoming state court asserting claims against an Internal Revenue Service (IRS) employee, Fred Bass; a bank branch president, Ron Thomas; and the bank's attorney, Gerald Goulding, for honoring an IRS levy against funds in the plaintiffs' bank account. The defendants removed the case to federal court. In a thorough and well-reasoned published opinion, the district court granted the defendants' motions to dismiss and denied the plaintiffs' motion for summary judgment as moot. *Jones* v. *Bass,* 343 F. Supp. 2d 1066, 1073 (D. Wyo. 2004). It ruled that the bank's attorney owed no legal duty to the plaintiffs: that the bank employee was immune from suit for honoring an IRS levy under 26 U .S.C. § 6332(e); and that the court lacked subject matter jurisdiction over the claims against the IRS agent, who, acting in his official capacity, is immune from suit under principles of sovereign immunity. *Id.* at 1069-70, 1073 . We affirm.

We review the district court's decision dismissing the plaintiffs' claims de novo. *Wyoming* v. *United States,* 279 F.3d 1214, 1222 (10th Cir. 2002) (reviewing dismissal under Fed. R. Civ. P. 12(b)(l), (6)). The district court correctly rejected plaintiffs' argument that it lacked jurisdiction over the case pursuant to 28 U .S.C. § 2201 of the Declaratory Judgment Act (barring declaratory relief in controversies "with respect to Federal taxes"). As the district court explained, section 2201 has no relevance to this case because the plaintiffs' suit is not a declaratory judgment action. *Jones,* 343 F. Supp. 2d at 1071. We agree with the district court that removal of this action was proper under 28 U.S.C. § 1442(a)(1). *Id.* Plaintiffs' next argument, that the judgment should be voided because the district court defamed them, is frivolous. It is well established that judges are entitled to absolute immunity from liability for defamation for words spoken or published in the course of judicial proceedings. *See e.g., Burns v. Reed,* 500 U.S. 478, 490 (1991) (noting

common-law rule). Finally, plaintiffs contend that the district court erred in granting the defendants' motions to dismiss and denying their motion for summary judgment. We have carefully reviewed the briefs and the record on appeal. For substantially the reasons stated in the district court's opinion, we affirm its dismissal of all of plaintiffs' claims.

The judgment of the district court is AFFIRMED. Appellee Bass's Unopposed Motion to Substitute Counsel is GRANTED. The mandate shall issue forthwith.

Entered for the Court

Michael R. Murphy Circuit Judge

APPENDIX B – JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

DATED AND FILED SEP 30, 2004

CASE No. 04-CV-153-D

Maurice Wayne Jones and Dorenda Price Jones,

Plaintiffs,

v.

FRED BASS, RON THOMAS, and GERALD GOULDING,

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to a hearing before the Court, The issues have been heard and a decision has been rendered. THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Judgment is entered in favor of Defendants.

Date September 30, 2004,

signed United States District Judge William Downes

APPENDIX C – ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING.

DATED AND FILED September 30, 2004.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

CASE No. 04-CV-153-D

Maurice Wayne Jones and Dorenda Price Jones,
Plaintiff(s),
v.
FRED BASS, RON THOMAS, and GERALD GOULDING,
Defendant(s).

ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants' Ron Thomas and Gerald Goulding's Motion to Dismiss, Defendant Fred Bass' Motion to Dismiss, and Plaintiffs' Motions for Summary Judgment filed June 25, 2004, The Court, having reviewed the materials submitted in opposition and support, having heard oral argument, and being otherwise fully advised, FINDS and ORDERS as follows:

BACKGROUND

Plaintiffs Maurice and Dorenda Jones ("Plaintiffs") filed a civil action in Wyoming State District Court, Lincoln County, Wyoming, on March 3, 2004, [sic] [correct date was March 30, 2004] asserting claims against Defendants Fred Bass, an employee of the United States Internal Revenue

Service ("IRS'); Gerald Goulding, attorney for First National Bank, Afton, Wyoming ('Bank'); and Ron Thomas, Branch President of the Bank. The claims arise out of the Bank's honoring a Notice of Levy served upon First National Bank on or about March 17, 2004 by the IRS for Plaintiffs' alleged unpaid balance of tax assessment. Plaintiffs allege that the Notice of Levy is invalid and that Defendants' actions in serving, accepting, or advising others to honor the Notice of Levy were in error, harmful to Plaintiffs, and in violation of the law

On May 24,2004, the U.S. Attorney on behalf of Defendant Fred Bass, an employee of the federal government, filed a Notice of Removal with this Court pursuant to 28 U.S.C. §1442(a)(l), which states:

A civil action ... commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue....

28 U.S.C. § 1442(a)(J) (2004). Plaintiffs objected to the removal, claiming the U.S. District Court lacks subject matter jurisdiction to hear the case.

Four motions are currently pending in this ease, Plaintiffs filed two motions for summary judgment on June 25, 2004,

which lack legal substance. Defendants Thomas and (Goulding filed a joint Motion to Dismiss for failure to state a claim on June 22, 2004 and Defendant Bass filed a Motion to Dismiss for lack of subject matter jurisdiction on June 25, 2004. The Court, finding Defendants' Motions to Dismiss as dispositive, dismisses Plaintiffs' Motions for Summary Judgment as moot.

STANDARD OF REVIEW

Defendants Thomas and Goulding moved to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). In ruling on motions to dismiss for failure to state a claim, "All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." *Ruiz v.* ***McDonnell,*** 299 F.3d 1173, 1181 (10th Cir. 2002) (quoting Swanson v ***Bixler,*** 750 Fad 810, 813 (10th Cir. 1984)). "The court must view all reasonable inference in favor of the plaintiff and the pleadings must be liberally construed. The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support her claims." ***Id,*** (citations omitted). "A Rule 12(b)(6) motion to dismiss nay be granted only if it appears beyond a doubt that the plaintiff is unable to prove any set of facts entitling her to relief under her theory of recovery." ***Jet.*** (citing *Conley* v ***Gibson,*** 335 U.S. 41, 45-46 (1957)).

Defendant Bass moved to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(l). The standard ofreview is substantially similar in considering a I 2(b)(l) motion to dismiss as for considering a 1 2(b)(6) motion to dismiss. "Accepting the complaint's allegations as true, we consider whether the complaint, standing alone, is legally sufficient to slate a

claim upon which relief can be granted..' *EFW v. St. Stephen's Indian High School.* 264 F.3d 1297, 1303 (10th Cir. 2001).

DISCUSSION

Defendants Ron Thomas and Gerald Goulding's Motion to Dismiss

Ron Thomas and Gerald Goulding moved to dismiss pursuant to Federal Rule of Civil Procedure l2(b)(6). As to the claim against Gerald Goulding, Defendants interpret Plaintiffs' Complaint to allege that Mr. Goulding gave legal advice to First National Bank, thereby making him an accessory to an illegal levy against the Plaintiffs. Defendants assert that such a claim sounds in negligence. As an attorney for the Bank, Defendants argue that Mr. Goulding has no duty to the Plaintiffs. As no duty exists, a negligence action cannot be maintained. Regarding Ron Thomas, Defendants assert immunity bars any claim against him. Defendants state that as an employee of a bank that simply honored an IRS levy, Mr. Thomas qualifies for immunity under 26 U.S.C. § 6332(e) and (f). In the alternative, Mr. Thomas had no contract with the Plaintiffs such that a breach of contract action would lie, nor did he have a duty to the Plaintiffs such that a negligence action would lie. In addition, if the Plaintiffs assert a claim for conversion, one cannot lie where the property involved is a bank account from which a legitimate creditor has demanded payment. Finally, if the Complaint is construed to allege fraud, it has not been pleaded with sufficient particularity.

In opposition to Defendants' Motion to Dismiss, Plaintiffs' sole argument is that this Court has no jurisdiction over the matter. When given the opportunity to supplement its arguments, Plaintiffs add that Mr. Thomas and Mr. Goulding failed to write a simple letter asking alleged IRS agent Bass for clarification regarding the legality and scope of the Notice of Levy." Plaintiffs' Supp. to Pending Motions, at 6.

As to Mr. Goulding, because the Plaintiffs do not explicitly outline the causes of action relied upon in their Complaint, the Defendants in their Motion to Dismiss are left to speculate. Defendants have presumed from the factual allegations against Mr. Goulding that Plaintiffs assert a claim for negligence against him for the advise [sic] given to Mr. Thomas to treat the Notice of Levy as any other levy. To maintain a claim for negligence, the Plaintiffs must demonstrate all the elements of negligence, including the legal duty owed by the defendant to the plaintiff. *Brooks v. Zebre,* 792 P.2d 196, 200 (Wyo. 1990). Whether a legal duty exists is a question of law. *Id.*

It is clear under Wyoming law that an attorney owes a duty of zealous representation to his/her client. *Id.* In an adversarial context, a duty to the opposing party cannot be assumed by an attorney, as it would violate the primary duty of the attorney to his/her own client. *Id.* In other contexts, it is possible for an attorney to owe a duty to a non-client, *i.e.,* when the non-client is a third-party beneficiary to the relationship between the attorney and client. See *In re Estate Drwenski, 83 P.3d 457 (Wyo. 2004).* The Wyoming Supreme Court has recently adopted a set of factors to consider in determining whether an attorney owes duty to a non-client. Id at 464-65. The court will consider: (1) the extent to which the transaction was intended to directly benefit the plaintiff; (2) the foreseeability of harm; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) whether expansion of liability to the non-client would place an undue burden on the legal profession; and (6) the policy of preventing future harm. Id. The 'threshold question' is whether the attorney-client relationship was intended to benefit a third-party. Id. If an intent to benefit a third-party is not found, the other factors need not be considered. *Id.*

Upon consideration of the above factors, as a matter of law, Mr. Goulding did not owe a legal duty to the Plaintiffs, Under a *Drwenski* analysis, Plaintiffs in this case were not intended to be third-party beneficiaries to the attorney-client relationship between Mr. Goulding and the Bank. Thus, there is no need to consider the other *Drwenski* factors, In contrast, this case more closely resembles the adversarial situation in *Brooks* in that Mr. Goulding's advise to his client, Mr. Thomas as an agent of the Bank, was directly adverse to the interests of the Plaintiffs. He advised his client to treat the Notice of Levy like any other levy, in effect advising Mr. Thomas to surrender the funds from the Plaintiffs account to the IRS. In such an adversarial situation, an attorney cannot have a legal duty to the opposing party, as it would "violate the primary duty" owed to the attorney's own client. Owing no duty to the Plaintiffs, Mr. Goulding cannot beheld liable under a negligence theory for his legal advise.

The Complaint against Mr. Goulding also asserts that he *"became a principal or an accessory engaging in fraudulent actions,..."* Complaint, at 2. As distinguished from well-pleaded facts, such a "conclusory allegation" need not be taken as true. *Ruiz v. McDonnell,* 299 F.3d at 1181. In addition, Wyoming law requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Wyo. R. CIV. PRO. 9(b) (LexisNexis 2004). Plaintiffs have asserted no particular facts that would establish that the elements of fraud are present in this case, *i.e.,* (1) the defendant made a false representation intended to induce action by the plaintiff; (2) the plaintiff reasonably believed the representation to be true; and (3) the plaintiff relied on the false representation and suffered damages. *Marcfian: v. Cook, 967* P2d *551,* 554 (Wyo. 1998). In accordance with the Court's findings, the Complaint against Mr. Goulding is dismissed.

As to Mr. Thomas, quite rightly, he asserts in his motion to dismiss that he is immune from any claim arising out of the surrender of funds from Plaintiffs' bank account pursuant to the Notice of Levy. United States statute is clear that '(a]ny person in possession of property subject to levy upon which levy has been made who, upon demand by the Secretary, surrenders such property to the Secretary shall be discharged from any obligation or liability to the delinquent taxpayer . . . ." 26 USC, 6332(e) (2004). "Person" as defined in the statute includes "an officer or employee . . . who . . . is under a duty to surrender the property . . . or discharge the obligation." *Id.* 6332(f). Not only is Mr. Thomas immune from any suit brought by a tax evader for honoring the levy, if he had failed to surrender the funds to the IRS, he would have become liable himself for the amount he failed to surrender, *Id* § 6332(d)(l). The Tenth Circuit has recognized the complete defense afforded by 26 U.S.C. § 6332(e) for "honoring . . . federal tax levies," *US. v. Triangle Oil,277* F.3d 1251,1259(10th Cir. 2002). In light of the statute and case law, it is clear the [sic] Mr. Thomas cannot be held liable by Plaintiffs for surrendering funds from Plaintiffs' bank account pursuant to a valid levy by the IRS. If the Plaintiffs contest the validity of the levy, that matter should be taken up with the IRS by filing Form 8546, as referenced on the Notice of Levy. Accordingly, the claims against Mr. Thomas are dismissed and the Court need not consider the other arguments in favor of dismissal proffered by Mr. Thomas.

The sole legal argument offered in opposition to Defendants Goulding and Thomas Motion to Dismiss is that this Court lacks subject matter jurisdiction over the present claims. In support of their contentions, Plaintiffs claim that "federal tax issues cannot be resolved by this court in that the Federal courts axe barred from original or pendant jurisdiction over such federal tax issues, pursuant to Title28 U.S.C. Sec. 220l(a)l . . ." Plaintiffs' Supp. to Pending Motions, at 7-8. In

addition to 28 U.S.C. 2201(a), Plaintiffs cite *Fogel v. U.S.*, 2001 WL 306496 (S.D. Cal. 2001) and *Hughes v. U.S.*, 953 F.2d 531 (9th Cir. 1991), in an attempt to demonstrate that the Court has no subject matter jurisdiction. Plaintiffs reliance on the statute and case law is misplaced.

United States Code, title 28, section 2201(a) is entitled 'Creation of a Remedy" and is incorporated in the Declaratory Judgment Act, According to Black's Law Dictionary, a declaratory judgment is "a binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement," BLACK'S LAW DICTIONARY 846 (7th ed. 1999). A declaratory judgment action can be brought pursuant to the Declaratory Judgment Act before any actual harm has occurred and the trial court can, in its discretion, decline to extend jurisdiction to such a case. *Kunkel v. Continental Casualty Company,* 866 F.2d 1269, 1273(10th Cir. 1989). United States Code, title 28, section 2201(a) does in fact prohibit the federal courts from entertaining declaratory judgment actions involving federal tax issues:

In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes* , . . any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. 2201(a) (2004) (emphasis added). The present action however, is not a declaratory judgment action, but a first-party action claiming an injury has occurred and praying for relief. As such, the prohibition of 28 U.S.C. § 2201(a) does not apply. It follows that the cases cited by the Plaintiffs which rely on 28 U.S.C. § 2201(a) are also inapplicable to the present case. See *Fogel v. U.S.,* 2001 'WL 306496 (S.D. Cal. 2001) ("Because section 2201(a) of the

Declaratory Judgment Act expressly denies federal courts subject matter jurisdiction over *requests for declaratory judgments* in federal tax matters, the Government's motion to dismiss for lack of subject matter jurisdiction is GRANTED.,. ," (emphasis added)); *Hughes v U.S.*, 953 F.2d 531, 536-37(9th Cir. 1991) (affirming District Court's denial of subject matter jurisdiction over *the declaratory judgment action* because it involved issues of federal taxation).

Subject matter jurisdiction is found in this case. The provisions of 28 U.S.C. § 1442(a)(1) allow for the removal of the case at bar from state to federal court:

A civil action . . . commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency there of or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. 1442(a)(1). Fred Bass, an employee of the IRS, was named in the Complaint in his official capacity, as discussed later, for sending the Notice of Levy on the Bank. As such, the case was properly removed to this Court and this Court has subject matter jurisdiction to decide the issues presented.

Defendant Fred Bass' Motion to Dismiss

In support of his Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, Mr. Bass argues first that the United States is the proper defendant in this case, as the Plaintiffs' claims are based on actions taken by Mr. Bass in his official capacity as

an IRS agent. Mr. Bass goes on to argue that this case is essentially a suit against the United States, and is barred by sovereign immunity, absent express statutory consent to sue. In addition, the limited waiver of sovereign immunity related to the challenge of a levy does not apply in this case and dismissal for lack of subject matter jurisdiction is appropriate. Finally, Mr. Bass asserts that this Court lacks subject matter jurisdiction over any request for declaratory and injunctive relief in this context.

In response to Mr. Bass' Motion to Dismiss, plaintiffs again challenge the subject matter jurisdiction of the Court to rule on the motion and demand remand to the state court. Plaintiffs also claim that Mr. Bass' "wrongful fraudulent filing of a claim of levy is not an official act of an officer of the U.S." and not within the scope of his authority. Plaintiffs' Response to Motion to Dismiss, at 6. To the extent that the Court finds that the claim is against the United States and not Mr. Bass in his individual capacity, Plaintiffs assert that the United States has waived sovereign immunity in this case by 'filing of Notice of Levy by Defendant Bass" in violation of "the Privacy Act and 26 U.S.C. § 6103." "

The first issue to resolve is whether Mr. Bass was named in Plaintiffs' Complaint in his official capacity as an employee of the IRS or whether he was named in his individual capacity. Interestingly, the only place the name of Fred Bass appears in Plaintiffs' Complaint is in the caption. In contrast, Plaintiffs in part III, Statement of the Case, aver that 'this action arises out of one alleged 'levy' titled 'Notice of Levy,' which was executed by a foreign power, 'United States' Internal Revenue Service . . ." plaintiffs admit in part III that the Notice of Levy was "prepared and transmitted under color of authority pursuant to [26 U.S.C. § 6331]." The Complaint goes onto state in part III that "the IRS, in an obvious and blatant act of deception, attempts to deceive the recipients of said notices . . ." In short, except for occasional

mention that the Notice was "fraudulently served," Plaintiffs' claims against Mr. Bass are essentially claims against the United States and any claim that Mr. Bass was fraudulent in presenting the Notice to the Bank has no basis in fact and is not pleaded with particularity as required under Wyoming law. See Wyo. R. CIV. PRO 9(b) (LexisNexis 2004).[1]

As the Complaint alleges claims against Mr. Bass in his official capacity as an employee of the IRS. it is essentially a suit against the United States, *Gilbert v. DaGrossa,* 756 F,2d 1455, 1458(9th Cir, 1985). As the Ninth Circuit Court of Appeals so aptly explained,

[1]The United States Attorney does not deny the Mr. Bass was acting in his official capacity in presenting the Notice of Levy to the Bank. In fact, in his argument in support of Mr. Bass' Motion to Dismiss, the U.S. Attorney states that "it is clear from the complaint that plaintiffs claims are based on actions taken by Mr. Bass in his official capacity."

It is well settled that the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued, Such waiver cannot be implied, but must be unequivocally expressed. Where a suit has not been consented to by the United States dismissal of the action is required. 'It is axiomatic that the United States may not be sued without its consent and that the existence of such consent is a prerequisite for jurisdiction.'

Id.. (quoting *United States v. Mitchell,* 463 U.S. 206, 212 (1983)) (other internal citations omitted). The court went on to conclude that 'a suit against IRS employees in their official capacity is essentially a suit against the United States. As such, absent express statutory consent to sue, dismissal is required." *Id.*

Absent a waiver of immunity, dismissal is required in a suit against an IRS employee acting in his official capacity. In this instance, the United States has acknowledged in its motion to dismiss that a limited waiver of sovereign immunity is available to those who would challenge a levy. See 26 U.S.C. § 7426 (a)(l) (2004). The Tenth Circuit has held that [a]ny waiver must be construed strictly in favor of the sovereign and not enlarged beyond what [its] language requires." *United Tribe of Shawnee Indians v. U.S.,* 253 F.3d 543, 547(10th Cir. 2001) (quoting *In re Talbot,* 124 F.3d 1201, 1206(10th Cir. 1997)). In this case, the waiver only applies to any person "other than the person against whom is assessed the tax out of which such levy arose." 26

U.S.C. 7426(a)(l). As a consequence, the person liable for the tax cannot maintain a wrongful levy action under the waiver of sovereign immunity. *See McCarty v. U.S.,* 929 F.2d 1085 (5th Cir. 1991); *Shannon* V. *U.S.,* 521 F.2d 56(9th Cir. 1975). The waiver of sovereign immunity does not apply to Plaintiffs who in this case are clearly those "against whom is assessed the tax out of which such levy arose." 26 U.S.C. § 7426(a)(l).[2]

[2]Plaintiffs assert in their response to Defendant Bass' Motion to Dismiss that the United States waived sovereign immunity by filing the levy in the offices of Lincoln County, Wyoming. As the United States Supreme Court made abundantly clear in *U.S. v. King,* "waiver cannot be implied, but must he unequivocally expressed." *U.S. v. King,* 395 U.S. 1,4 (1969). Filing a levy in Lincoln County. Wyoming, does not constitute an "unequivocally expressed waiver."

Where the United States has been sued and sovereign immunity has not been waived, dismissal for lack of subject matter jurisdiction is appropriate. *See U.S. v. Mitchell,* 463 U.S.206, 211(1983) (stating that consent to suit is a 'jurisdictional prerequisite"); *see also F.D.I.C. Meyer,* 510

U.S. 471 (1994); *Merrill, Lynch, Pierce, Fenner, & Smith, Inc. v. Jacks,* 960 F.2d 911 (10th Cir. 1992).

Fred Bass has been sued by Plaintiffs in his official capacity as an employee of the IRS. As such, the suit is essentially against the United States and therefore, barred by sovereign immunity. Although a limited waiver of sovereign immunity exists for challenging a wrongful levy, that waiver explicitly precludes applicability to the Plaintiffs as "person[s] against whom is assessed the tax out of which such levy arose." 26 U.S.C. § 7426(a)(1). The claims against Mr. Bass and the United States as principal are dismissed for lack of subject matter jurisdiction and Plaintiffs' motion for summary judgment on those claims is dismissed as moot. Therefore, it is hereby

ORDERED that Defendants Ron Thomas and Gerald Goulding's Motion to Dismiss is **GRANTED**, Defendant Fred Bass' Motion to Dismiss is **GRANTED**, and Plaintiffs' Motions for Summary Judgment, filed June 25, 2004, are **DISMISSED** as moot. Plaintiffs' Complaint is **DISMISSED** with prejudice.

DATED this 30th day of September, 2004,

William Downes

Chief United States District Judge